

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRACE KERN & JESSICA HUIGENS,

Individually and as the representatives of
a class of similarly situated persons,

CASE NO.: 1:16-CV-00008

Plaintiffs,

HON. ROBERT HOLMES BELL

vs.

USA TRAVEL SERVICES, et al.,

Defendants.

**DEFENDANTS NEWPORT HOSPITALITY, LLC D/B/A NEWPORT BEACHSIDE
HOTEL & RESORT AND NEWPORT VACATIONS, LLC'S
MOTION TO DISMISS SECOND AMENDED COMPLAINT (D.E. 152)
(Oral Argument Requested)**

Defendants, Newport Hospitality, LLC and Newport Vacations, LLC (the “Newport Defendants”), by and through undersigned counsel and pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6), hereby move to dismiss all claims asserted against the Newport Defendants in the Second Amended Complaint filed by Plaintiffs, Brace Kern and Jessica Huigen (the “Plaintiffs”) (D.E. 152), based upon the following:

1. Plaintiffs purport to bring this putative class action under the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. (“TCPA”), with respect to telephone calls Plaintiffs claim they received from Defendants, USA Travel Services and/or VIP Travel Services using an Automated Telephone Dialing System and a pre-recorded or artificial voice message.

2. Plaintiffs also sued the Newport Defendants, both of whom are Florida limited liability companies and domiciled in the State of Florida, based solely on a theory that the Newport Defendants are vicariously liable for the acts of either USA Travel Services and/or VIP Travel Services.

3. As set forth in the accompanying Memorandum of Law in Support of this Motion to Dismiss and attached Affidavit, Plaintiffs have failed to allege (and cannot allege) sufficient facts showing that personal jurisdiction over the Newport Defendants exists in the State of Michigan.

4. In fact, those few facts that *have been alleged* actually show on their face that this Court cannot exercise personal jurisdiction over the Newport Defendants in accordance with the requirements of the Due Process Clause. In the Second Amended Complaint, Plaintiffs expressly state that they received the alleged unlawful telephone calls on their cell phones with New York telephone numbers. As a consequence, even *assuming* that the Newport Defendants could be held vicariously liable for the acts of USA Travel Services and/or VIP Travel Services (which they cannot), because the allegedly unlawful calls were made to New York telephone numbers, no conduct was purposefully directed to or otherwise created a substantial connection with the State of Michigan and the Newport Defendants have not “purposefully availed” themselves of this forum. This Court, therefore, cannot exercise personal jurisdiction over the Newport Defendants in accordance with the Due Process Clause and all claims against the Newport Defendants should be dismissed pursuant to Rule 12(b)(2).

5. Plaintiffs have also sued the wrong party and, notwithstanding Plaintiffs’ actual knowledge of this critical error, persisted in seeking leave to file the instant Second Amended Complaint.

6. Finally, the Second Amended Complaint, Plaintiffs’ third attempt to state a cause of action, is devoid of any factual allegations that would support a finding that either of the Newport Defendants are vicariously liable for the conduct of any other defendant for any alleged violations of the TCPA and as such, should be dismissed with prejudice pursuant to Rule

12(b)(6). So as not to burden the Court with reading redundant or otherwise duplicative arguments, the Newport Defendants join in and adopt those arguments regarding the insufficiency of Plaintiffs' pleading set forth Defendant A&M Resorts, LP's Rule 12(b)(6) Motion to Dismiss and supporting Memorandum of Law, which were filed on November 15, 2016. (D.E. 154 & 155).

7. Pursuant to Local Rule 7.1(d), the undersigned certifies that this Motion is opposed.

Respectfully submitted,

By: /s/: Franklin L. Zemel

Franklin L. Zemel, Esq.
Florida Bar No. 816620
(Admitted to Western District of Michigan)
Alan R. Poppe, Esq.
Florida Bar No. 0186872
(Admitted to Western District of Michigan)
ARNSTEIN & LEHR LLP
200 East Las Olas Boulevard, Suite 1700
Fort Lauderdale, Florida 33301
Tel: (954) 713.7600
Email: franklin.zemel@arnstein.com
apoppe@arnstein.com

and

Brandon J. Wilson (P73042)
**HOWARD & HOWARD ATTORNEYS
PLLC**
450 West Fourth Street
Royal Oak, MI 48067-2557
(248) 645-1483
Email: bjw@h2law.com

Attorneys for the Newport Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of November, 2016, a true and correct copy of the above and foregoing was filed with the Clerk of the Court via the Court's CM/ECF system, which serve electronically serve a copy on all counsel of record.

By: /s/: Franklin L. Zemel
Franklin L. Zemel, Esq.
Florida Bar No. 816620
(Admitted to Western District of Michigan)